STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN,

Plaintiff-Appellant,

v

CALHOUN COUNTY JAIL,

Defendant-Appellee.

UNPUBLISHED
March 25, 2021

No. 352334
Calhoun County Circuit Court
LC No. 2019-002106-CZ

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

PER CURIAM.

In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, American Civil Liberties Union of Michigan ("ACLU") appeals the trial court's order granting defendant[1] Calhoun County Jail's motion for summary disposition under MCR 2.116(C)(8) and (C)(10) and denying plaintiff's cross-motion for partial summary disposition under MCR 2.116(C)(9) and (C)(10). Plaintiff argues that the trial court erred by finding that the records of Calhoun County Sheriff's Office (CCSO) were exempt from disclosure under MCL 15.243(1)(d).[2] We disagree and affirm.

[1] Calhoun County Jail is the named defendant in this case, but is not capable of being sued as a separate legal entity. See, e.g., *McPherson v Fitzpatrick*, 63 Mich App 461, 463-464; 234 NW2d 566 (1975). However, both parties refer to the Calhoun County Sheriff's Office (CCSO) as defendant, but that office is not named as a defendant. Despite these procedural anomalies, because neither party has raised the issue, we will assume the Jail is a proper party.

[2] Plaintiff's arguments on appeal relate only to the granting of summary disposition in favor of defendant.

I. BACKGROUND

Plaintiff submitted two FOIA requests to defendant requesting records related to the detention of Jimar Benigno Ramos-Gomez, a United States citizen who was allegedly unlawfully detained by Immigration and Custom Enforcement, "ICE," and held at the Calhoun County Jail in December 2018. Defendant denied the requests and asserted that the records were exempt from disclosure under MCL 15.243(1)(d)[3] because they related to an ICE detainee. Plaintiff filed a complaint in circuit court alleging that defendant violated FOIA by denying its FOIA request submitted in January 2019. In response, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff's FOIA requests were appropriately denied under MCL 15.243(1)(d) because, under 8 CFR 236.6 and "2016 FR 72080.01," the records and information sought were "not public records subject to disclosure by defendant." Defendant asserted that the exemption under MCL 15.243(1)(d) applied to federal regulations, citing *Soave v Dept of Ed*, 139 Mich App 99, 102; 360 NW2d 194 (1984).[4] Further, defendant argued that because plaintiff requested documents and information relating to Mr. Ramos-Gomez's ICE detention, 8 CFR 236.6 applied and a request for the release of such records was required to be submitted to ICE.

The trial court granted defendant's motion for summary disposition, reasoning:

> The jail here has a contract with ICE through the federal government for housing detainees and based upon that when you look at the Michigan Freedom of Information Act it directs you towards, is there any other statute that should prevent these records from being disclosed and the definition of statute is adequately defined by the Defendant in this and that is the federal regulation that was sited [sic].

The court determined that plaintiff's exclusive remedy was to request the records from ICE and that, on the basis of the federal regulation and Michigan FOIA law, it did not have the authority to order CCSO to disclose the records. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo whether a trial court properly granted a motion for summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court's review is "limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). "This Court reviews de novo whether the trial court properly interpreted and applied the FOIA." *Mich Open Carry, Inc v Dep't*

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[3] MCL 15.243(1)(d) provides that "[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by statute."

[4] This case was decided before November 1, 1990, and, therefore, it is "not binding precedent, MCR 7.215(J)(1), [but it] can be considered persuasive authority," *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

of State Police, 330 Mich App 614, 621; 950 NW2d 484 (2019). The trial court's factual findings underlying its application of the FOIA are reviewed for clear error. *Id.* "A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made." *Id.*

Although the trial court did not indicate whether it granted defendant's motion under MCR 2.116(C)(8) or (C)(10), it considered affidavits and documentary evidence beyond the pleadings. Therefore, we construe the motion as being granted under MCR 2.116(C)(10). See *Cuddington v United Health Services, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018) (quotation marks and citation omitted).

III. ANALYSIS

"The Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). "[P]ublic bodies are required to disclose all public records that are not specifically exempt from disclosure under the act." *Landry v Dearborn*, 259 Mich App 416, 419; 674 NW2d 697 (2003). "[T]he statutory exemptions must be narrowly construed to serve the policy of open access to public records." *Mich Open Carry, Inc*, 330 Mich App at 625. Accordingly, defendant can only withhold public records for which it has proven that an exemption applies. *Landry*, 259 Mich App at 419.

The trial court determined that the records requested by plaintiff were exempt from disclosure under MCL 15.243(1)(d) as a result of 8 CFR 236.6. MCL 15.243(1)(d) provides that "[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by statute." 8 CFR 236.6 provides:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service[5] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the

[5] "Service" means "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." 8 CFR 1.2.

> Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

It is undisputed that Mr. Ramos-Gomez was held and detained by CCSO because of an ICE detainer and as a result of CCSO's contract to act as a holding facility for individuals arrested by ICE or at the request and authority of ICE. Additionally, James Dyer, FOIA Coordinator for CCSO, asserted that CCSO only had records and information due to Mr. Ramos-Gomez's December 2018 ICE detention.

Plaintiff argues that the Department of Homeland Security (DHS) did not have the authority to preempt state public record laws because Congress did not delegate to it the authority to restrict public access to records. The United States Supreme Court has recognized that, in regard to federal preemption of a state law, "the Court starts with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *New York v FERC*, 535 US 1, 18; 122 S Ct 1012; 152 L Ed 2d 47 (2002) (quotation marks, brackets, and citations omitted; alteration in original). The Immigration and Nationality Act, 8 USC 1101, *et seq*., governs the powers and duties of the Secretary of Homeland Security and provides, in pertinent part:

> (1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That [sic] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.
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> (2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.
>
> (3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.
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> (4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. [8 USC 1103(a)(1) to 8 USC 1103(a)(4).]

Therefore, 8 USC 1103(a)(2) and (a)(3) explicitly grants the authority to establish regulations controlling the files and records of ICE to the Secretary of Homeland Security, which included establishing 8 CFR 236.6, a federal regulation of the Department of Homeland Security.

Next, plaintiff argues that the records were not exempt because 8 CFR 236.6 is a regulation, not a statute, within the meaning of MCL 15.243(1)(d). Plaintiff cites *Detroit Free Press v City of Warren*, 250 Mich App 164; 645 NW2d 71 (2002). In *Detroit Free Press*, this Court concluded that the trial court erred when it determined that the requested records were exempt under MCL 15.243(1)(d) based on defendant's assertion that FR Crim P 6(e) was a statute that barred them from disclosure. *Id*. at 170-171. The Court reasoned "[g]iven that MCL 15.243(1)(d) plainly includes only statutes, and not rules of procedure, F R Crim P 6(e) cannot serve as a basis for exemption in this case." *Id*. at 171. However, the instant case is distinguishable from *Detroit Free Press* because defendant argued that the records were exempt because of a federal regulation, which was created as a result of the authority expressly conferred by a federal statute. Additionally, this Court has held that federal regulations can exempt records from disclosure under MCL 15.243(1)(d). In *Michigan Council of Trout Unlimited v Dept of Military Affairs*, 213 Mich App 203, 218, 220; 539 NW2d 745 (1995), this Court, citing *Soave*, 139 Mich App at 102, held that the trial court properly denied plaintiff's request for documents under MCL 15.243(1)(d) because disclosure of the documents were governed by federal regulations. In the instant case, although the trial court did not explicitly find that 8 CFR 236.6 resulted from the statutory authority granted under 8 USC 1103(a), the records were properly exempted under MCL 15.243(1)(d). Therefore, because 8 CFR 236.6 applied, defendant was not permitted to disclose the requested information and plaintiff was required to seek the requested records through a federal FOIA request.

Plaintiff also argues that 8 CFR 236.6 does not apply to former detainees because the plain language of the regulation uses present tense verbs. 8 CFR 236.6 states that the records of a detainee are under the control of DHS and that "the name of, or other information relating to, such detainee" may not be disclosed by any person, "including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service." Further, "[s]uch information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders." 8 CFR 236.6. The plain language of the regulation clearly states that all information relating to a detainee is "under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders." 8 CFR 236.6. Based on the plain language of the regulation, there is no basis to find that records may be disclosed by CCSO after a detainee is released.

Plaintiff also asserts that 8 CFR 236.6 does not apply because Mr. Ramos-Gomez was a United States citizen at the time he was detained and federal immigration authority did not possess the legal authority to detain him. Mr. Ramos-Gomez was detained as a result of a detainer issued by ICE. Detainers are issued under 8 CFR 287.7. "A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 CFR 287.7(a). "Alien" means "any person not a citizen or national of the United States." 8 USC 1101(a)(3). Although Mr. Ramos-Gomez was not an alien within the meaning of the Immigration and Nationality Act and,

therefore, there was no apparent basis for the insurance of a detainer, he was still a "detainee" because he was detained by defendant as a result of an ICE detainer.

Plaintiff argues that Mr. Ramos-Gomez was entitled to his own records under the Privacy Act, 5 USC 522a(d)(1)[6]. The trial court did not specifically address this argument. However, this argument has no merit as it relates to Michigan's FOIA because 8 CFR 236.6 applies and plaintiff was required to submit its FOIA request to the federal government.

Next, plaintiff argues that even if some of the records are exempt under 8 CFR 236.6, CCSO is required to provide nonexempt records. 8 CFR 236.6 specifically exempts the disclosure of "other information" related to detainees by CCSO, which would include CCSO's own records. Therefore, the trial court did not clearly err when it determined that all records relating to the detention of Mr. Ramos-Gomez as an ICE detainee were exempt from disclosure by CCSO under 8 CFR 236.6 and that the FOIA request was appropriately denied under MCL 15.243(1)(d).

Plaintiff asserts that as a practical matter Mr. Ramos-Gomez will likely not be able to obtain state and local records regarding his detention if this Court affirms the trial court's decision because federal FOIA cannot be used to "obtain records of which federal agencies have neither custody nor control[.]" The record indicates that plaintiff submitted a FOIA request to ICE regarding records and was awaiting its response. On appeal, plaintiff does not indicate whether or not ICE disclosed records in response to the record request, and this Court does not address hypothetical issues. See *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983). Additionally, whether plaintiff as a practical matter is precluded from obtaining these records is completely immaterial to our duty to determine whether the law required defendant to comply with the FOIA.[7]

Plaintiff also argues that federal agencies cannot implement regulations that restrict access to public records under 5 USC 301. 5 USC 301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the

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[6] 5 USC 552a(d)(1) provides:

ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence[.]

[7] It is defendant's position that the release of the records is dependent upon ICE. We recognize that the FOIA request submitted to ICE was the appropriate mechanism to obtain such records and that ICE could direct defendant to release the requested records as a result of pending federal litigation.

> distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

However, contrary to plaintiff's assertion, 8 CFR 236.6 does not "make[] secret entire categories of public documents[.]" Rather, the regulation specifies that requests for such records are required to be submitted to and addressed by the federal government, in this case ICE.

The trial court did not err when it concluded that defendant appropriately denied plaintiff's FOIA request under MCL 15.243(1)(d) as a result of 8 CFR 236.6 and granted summary disposition under MCR 2.116(C)(10) in favor of defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ /Michelle M. Rick